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Case No. ____

In the Supreme Court of the United States

Joseph Paul Biernat,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court's exclusion of a signature set of interrogation tactics, offered under Federal Rule of Evidence 404(b) at trial by a criminal defendant as proof of untrustworthiness of the prosecution's confession evidence, deprives a criminal defendant of his constitutional rights to present a complete defense and to have a jury determine whether to accord weight to confession evidence.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties shown on the caption of this petition, Thomas James Martin was a defendant in the district court and an appellant in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Joseph Paul Biernat petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in Case Nos. 03-2007, 03-2255 and 03-2549.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 369 F.3d 1046 and is reprinted at App. A2-A28. The Eighth Circuit's denial of Petitioner's petition for rehearing with suggestion for rehearing *en banc* is reprinted at A1.

The district court's ruling excluding Petitioner's Rule 404(b) evidence is reflected in transcripts reproduced at A29-A33 and A35-A39.

STATEMENT OF JURISDICTION

The Eighth Circuit issued its judgment on May 28, 2004. Petitioner's timely petition for rehearing with suggestion for rehearing *en banc* was denied on August 12, 2004. This Court's jurisdiction is based on 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 3501(a), of the United States Code provides:

> If the trial judge determines that the confession was voluntarily made it shall be admitted into evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

Federal Rule of Evidence 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

The Eighth Circuit found the trial court's exclusion of evidence "difficult to square with *Crane*." (App. at A21.) In *Crane v. Kentucky,* 476 U.S. 683 (1986), Justice O'Connor wrote that since *Jackson v. Denno*, 378 U.S. 368 (1964), a criminal defendant has been constitutionally free to present trial proof relating to the weight and voluntariness of confession evidence, holding that the probative weight of confession evidence is "exclusively for the jury to assess." *Crane*, 476 U.S. at 688. In *Blakely v. Washington,* 124 S. Ct. 2531 (2004), this Court again addressed the critical importance of the jury in determining all facts relating to criminal culpability. *See id.* at 2536-43.

The trial court below usurped the role of the jury by ruling that evidence of interrogation tactics and psychological coercion would be excluded; the Eighth Circuit compounded that error by its affirmance of petitioner's conviction.

Both scientific study and recent case law convincingly demonstrate that psychologically coercive interrogation tactics breed false confessions. Public exposure to coercive

interrogation tactics is at an all-time high. The present milieu poignantly teaches the reality that no confession is *legally true* until a jury decides it to be so.

After Petitioner submitted proffers of evidence showing that the interrogating FBI Agent engaged in unusual copycat patterns of interrogation in multiple cases, which were identical to those used in interrogation of Petitioner, (App. at A44-A45), the trial court ruled tersely and without explanation that "I don't find that to be a 404(b) purpose envisioned within the rules and appropriately admissible," (App. at A33). It further ruled that "interrogation tactics or evidence relating to the voluntariness determination are inappropriate and will not be the basis for cross examination of the agent." (App. at A36.)

Petitioner sought to prove a signature set of the agent's interrogation tactics, including, *inter alia,* idiosyncratic and peculiar "invitations " to talk, oddly similar threats against relatives and acquaintances, premeditated planning of "show and tell" materials, bold patterns of deception and ruse, and use of prolonged periods of time to wear down the subject. (App. at A44-A45) The evidence was offered both as substantive proof of psychological coercion in the interrogation methods deployed against Petitioner, as well as impeachment of the interrogating agent.

The jury issue to which Petitioner directed the proffered evidence was the well-established test for "voluntariness," namely "totality of all the surrounding circumstances—both the characteristics of the accused and the *details of the interrogation.*" *Dickerson v. United States,* 530 U.S. 428, 434 (2000) (emphasis added). The Rule 404(b) proof offered by Petitioner in this case constituted persuasive proof to convince the jury that the interrogation occurred as

he claimed, instead of as the prosecution claimed. He was deprived of this weighty challenge to the confession evidence.

The Rule 404(b) evidence also was a critical means for Petitioner to corroborate his wife's testimony of specific coercive tactics employed in her presence; its exclusion deprived petitioner of proof to demonstrate the truth of his wife's testimony, and therefore of the jury to fully weigh the trustworthiness of the coercion evidence. The evidence would have operated as well to impeach the interrogating agent. The *Crane* Court stated, "[T]he physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt." *Id.* at 689.

Proceedings Below

1. Petitioner was a Minneapolis City Councilman, indicted under the Hobbs Act, mail fraud and other federal statutes in connection with his vote to appoint his co-defendant to a local trades board. (App. at A3.)

2. After a jury trial, Petitioner was acquitted of the Hobbs Act charges, but convicted on the counts of mail fraud, theft of union funds, and giving a false statement to the FBI. (App. at A3.) Both the district court and the court of appeals found that Petitioner was a minor participant in the alleged scheme, and that the codefendant had been the architect of the scheme. Petitioner was described by the lower courts as "a passive recipient." (App. at A28.)

3. The Government's proof of Petitioner's intentional participation in the charged offenses consisted almost entirely of two statements prepared by an

interrogating FBI agent and signed by Petitioner in the Agent's presence. (App. at A4-A10.) At trial, Petitioner centered his defense on the unreliability and untrustworthiness of the two statements, presenting proof that Petitioner had battled with the interrogating agent about the agent's words of inculpation written into the statements, and signed the statement only after a threat and ultimatum were presented by the agent. (App. at A40-A52.) The alleged confessions upon which the Government relied were procured after seven hours of interrogation, employing signature tactics used by the agent in prior interrogations.

4. Prior to trial, Petitioner moved to suppress those statements on the grounds of, *inter alia*, involuntariness. The district court denied the motion to suppress. (App. at A10.)

5. At trial, Petitioner proffered the Rule 404(b) evidence and made a formal motion for admission of the evidence. This evidence supported Petitioner's central defense that the FBI agent's methods were psychologically coercive, deliberately designed to break the will of interviewees, and therefore produced untrustworthy results. In addition, Petitioner wished to challenge the credibility of the interrogating FBI agent concerning the circumstances of his interrogations, on numerous points including whether the agent used physical intimidation and physical contact at crucial junctures in the interrogation and whether Petitioner expressed indecision as to whether he should sign the statement. (App. at A41-49.)

6. At the conclusion of the motion hearing on the Rule 404(b) evidence the district court ruled the evidence inadmissible. (App. at A20.) Again, prior to cross-examination of the Government's agent, Petitioner renewed

the request to admit the evidence. (App. at A30-A31.) The district court stated, "I will not allow questions relating to coercion or whether or not the statements were involuntarily made. As I said, . . . the ruling is that the statement[s] [are] voluntary and therefore interrogation tactics or evidence relating to the voluntariness determination are inappropriate . . . ." (App. at A36.) Petitioner again raised the 404(b) issue at the close of the Government's case and the district court again ruled that Petitioner's evidence of the agent's interrogation tactics was inadmissible under Rule 404(b). (App. at A30-A33.)

7. On appeal, the Eighth Circuit found the district court's exclusion of the evidence "difficult to square with *Crane*." (App. at A21.) Yet the Eighth Circuit failed to determine whether the district court's evidentiary rulings comported with the Constitution and, instead, engaged in a dismissive harmless-error analysis, absent citation to any applicable authority. (App. at A21-A22.) The Eighth Circuit erroneously considered the substance of the confession evidence in its calculus of whether the *Crane* error was harmless. (App. at A22.)

8. The Eighth Circuit again erroneously refused to address the issue upon Petitioner's timely filed Petition for Rehearing with Suggestion for Rehearing En Banc. (App. at A1.)

REASONS FOR GRANTING REVIEW

The decisions below are in conflict with decisions of this Court. The district court erred when it excluded Petitioner's evidence concerning the Government agent's interrogation tactics pursuant to Federal Rule of Evidence 404(b). The exclusion of that evidence deprived Petitioner of

his constitutional right to present a complete defense, as established by *Crane v. Kentucky*, 476 U.S. 683 (1986), and his constitutional right to a fair trial under *Chambers v. Mississippi*, 410 U.S. 284 (1973). It also deprived Petitioner of his right, as recently confirmed by this Court in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), to have a jury be the exclusive arbiter of the trustworthiness of the government's confession evidence, and to rely on the jury as a safeguard against the product of psychologically coerced confession evidence becoming a factual basis for a finding of guilt.

Because a confession cannot constitutionally be determined to be either true or false until a jury determines its trustworthiness, this Court should grant the petition for writ of certiorari. In this specific context — of the right to jury determination of the truthfulness of confession evidence — it is important for the Court to apply the holdings of *Crane*, *Chambers*, and *Blakely*. It is important as well to resolve division in the Circuits about admissibility of "reverse" 404(b) evidence, and to provide guidance to the lower courts to treat proof of interrogation tactics and methods of psychological coercion as a jury question when confession evidence has been admitted by the trial court.

By issuing an opinion on these subjects, the Court will make clear that interrogation tactics are subject to jury determination on issues of guilt or innocence and are not limited to suppression determinations by the trial court. Such a ruling will ensure due process in acknowledgement of the increasing recognition that psychologically coerced confessions are indeed being shown to be false in all too many instances.

A. The Decisions Below Are in Conflict with Decisions of this Court Upholding the Constitutional Right to Have a Jury Determine the Factual Reliability of Confession Evidence.

Psychological coercion in the procurement of confessions violates the Constitution. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court recognized that

> the modern practice of in-custody interrogation is psychologically rather than physically oriented. [C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.

Id. at 448. *Miranda*'s holding was based on a concern for "what in fact goes on in the interrogation rooms." *Id.* To inform itself of the realities of American interrogation practices, the Court referred to "police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics." *Id.* In enumerating the tactics — such as "friendly-unfriendly" or Mutt and Jeff" act (p. 452), isolation of the suspect (p. 450), suggestions of fictitious evidence against the suspect, *e.g.*, the "reverse line-up" (p. 453), and putting the suspect in the interrogator's shoes (p. 453-54) — the *Miranda* Court reaffirmed and perpetuated the constitutional rule prohibiting use of coerced confessions. *Id.* at 450-54. In situations of custodial interrogation it added the now-familiar *Miranda* warning as a threshold requirement to safeguard the underlying principle of voluntariness.

The constitutional basis of *Miranda* was reiterated by this Court in 2000 in *Dickerson v. United States*, 530 U.S. 428 (2000), where the Court made no alteration to the bedrock principles prohibiting use of involuntary confessions, whether derived from custodial or non-custodial interrogations. In so doing, the Court expressly upheld *Miranda* over a Congressional attempt in 18 U.S.C. § 3501(b) to reduce its application. *See id.* at 443-44.

The *Dickerson* Court had no reason to address or disturb Section 3501(a), which governs the subject of confession evidence during trial. The statute provides that "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

Citing *Miranda*, this Court emphasized in *Lego v. Twomey*, 404 U.S. 477 (1972), that juries remain free at all times "to assess the truthfulness of confessions" and to hear "evidence relating to the accuracy or weight of confessions admitted into evidence." *Id.* at 485-86. This principle was expanded upon in *Crane*, where a unanimous Court recognized a criminal defendant's "prerogative to challenge [a] confession's reliability during the course of [a] trial" as part of the Constitutional guarantee of "a meaningful opportunity to present a complete defense." 476 U.S. at 690. At trial, the defendant in *Crane* attempted to introduce evidence — namely, cross-examination testimony of two police officers concerning the circumstances of the defendant's confession — to prove that the interrogation was psychologically coerced. *Id.* at 685. The trial court excluded this evidence on the ground that the issue of voluntariness already had been decided. *Id.*

This Court reversed the defendant's conviction, reasoning as follows:

> *[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?* Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to *convince the jury* that the manner in which the confession was obtained casts doubt on its reliability.

Id. at 689 (emphases added).

This impervious principle of criminal jurisprudence continues to inform the Court's decisionmaking, as reflected in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). There, the Court relied upon the "longstanding tenet[] of common-law jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by his unanimous suffrage of twelve of his equals and neighbors.'" *Id.* at 2536 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1749)). The same Sixth Amendment that requires the jury's consideration of "legally essential" sentencing facts in *Blakely*, *see* 124 S. Ct. at 2543, surely requires jury consideration of evidence challenging the reliability of a confession.

In this case, the district court blocked Petitioner's right to put on evidence "to convince the jury that the manner in which the confession was obtained casts doubt on its reliability." *Crane*, 476 U.S. at 689. The Eighth Circuit failed to correct this error. (App. at A21-A22.)

B. The District Court's Exclusion of Petitioner's Evidence Conflicts with Decisions of Other Circuits Regarding Admissibility of "Reverse 404(b) Evidence" Offered by a Criminal Defendant.

A trial court may not make an evidentiary ruling to exclude otherwise relevant evidence offered by a criminal defendant when such a ruling compromises the constitutional rights to present a full defense and to have a jury resolve all fact issues. The lower courts in this case violated these axiomatic principles by virtue of their treatment of the Rule 404(b) evidence offered by Petitioner.

An important antecedent to *Crane* speaks directly to the issue presented by this Petition. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court held that a criminal defendant was denied a fair trial by the application of state-law evidentiary rules that prevented him from introducing evidence of *another man's* confession to the crime for which the defendant was charged. *Id.* at 302-03. The state-law evidentiary rules at issue were the Mississippi hearsay rule and the Mississippi "voucher" rule, which prevented a party from impeaching his own witness. *Id.* at 295-98. Although the Court did not address application of those evidentiary rules for civil cases, it turned to the Due Process Clause in holding that, "In these circumstances, where constitutional rights directly affecting the ascertainment of

guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

The Rule 404(b) evidence Petitioner sought to introduce at trial was directly relevant to the central issue. The Government's case was based almost wholly on Petitioner's alleged confessions. Petitioner sought to introduce "other acts" evidence concerning the interrogating agent in an attempt to prove that the government's confession evidence was neither trustworthy nor true.

The district court's exclusion of Petitioner's evidence is consistent with an evidentiary interpretation of Rule 404(b) that prevails in some circuits and is contrary to that in other circuits. The issue has never been the subject of an opinion by this Court, and must be addressed in order to reconcile the divisions in the Circuits as well as to reconcile purely evidentiary admissibility questions with the constitutional right to a fair trial articulated in *Chambers*.

At least three circuit courts expressly allow a criminal defendant to introduce Rule 404(b) evidence relating to the conduct of third parties: *United States v. Stevens*, 935 F.2d 1380, 1405 (3d Cir.1991); *United States v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984); and *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977). These courts reason that the "rigid standard[s]" that apply to Rule 404(b) evidence offered by the prosecution is designed to avoid prejudice to the accused. But that rationale disappears when the defendant offers other-acts evidence. "'[W]hen the defendant is offering that kind of evidence exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility . . . .'" *Id.* at 1403 (quoting *State v. Garfole*, 388 A.2d 587, 591 (1978).) Further, a defendant need only

establish a reasonable doubt as to guilt or innocence whereas the prosecution must prove guilt beyond a reasonable doubt. *See id.* at 1403 n.25. The *Stevens* opinion discussed Wigmore's recognition that "reverse 404(b)" evidence should be available to the defendant to negate guilt and also reviewed the precedent recognizing that rule. *See id.* at 1401-06. After its careful analysis, the Third Circuit concluded, in the "reverse 404(b)" situation, that Rule 404(b) should not operate at all — *i.e.*, that "a criminal defendant should be able to advance any evidence that, first, rationally tends to disprove his guilt and, second, passes the Rule 403 balancing test." *Stevens*, 935 F.2d at 1406 (Becker, J.).

The Seventh Circuit followed *Stevens* in *Agushi v Duerr*, 196 F.3d 754 (7th Cir.1999), in making clear that Rule 404(b) evidence relating to third persons is admissible. *Id.* at 760. Writing for the panel of Judges Posner, Easterbrook, and himself, Judge Coffey parsed the language of Rule 404(b), as well as *Stevens*'s reasoning, to permit such evidence as a means "to negate . . . guilt." *Id.* In doing so, he recognized that this court, in *Huddleston v. United States*, 485 U.S. 681 (1988), "strongly suggested that Rule 404(b) should be applied to any actor." *Agushi*, 196 F.3d at 760 (citing *Huddleston*, 485 U.S. at 685-86).

Other circuit courts either prohibit or limit Rule 404(b) evidence offered by the defendant relating to third persons. *See United States v. Lucas*, 357 F.3d 599, 604-07 (6th Cir. 2004) (affirming exclusion of defendant's evidence of third person's prior drug conviction offered to support defense theory that third person, not defendant, possessed seized drugs); *Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000) (approving exclusion of defendant's evidence of accuser's alleged prior false accusation), *cert. denied*, 532 U.S. 913

(2001); *United States v. McCourt*, 925 F.2d 1229, 1231-33 (9th Cir.) (affirming exclusion of defendant's evidence of criminal record of third person offered to support defense theory that third person, not defendant, committed crime charged), *cert. denied*, 502 U.S. 837 (1991). These courts typically reason that the first sentence of Rule 404(b) applies to any "person," regardless whether the person is a criminal defendant, while it is the second sentence, which concerns advance notice of "other acts" evidence, that applies only to evidence offered against "the accused." *See Lucas*, 357 F.3d at 605.

Thus, the Court should grant this petition to address both the right of a criminal defendant to present Rule 404(b) evidence in support of his defense as well as the constitutional impropriety of limiting a defendant's evidence in situations where exclusion of such evidence infringes on the constitutional rights protected under *Crane, Chambers,* and *Blakely.* To paraphrase the admonition of *Chambers*, "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, [Rule 404(b)] may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

C. Jury Consideration of Psychologically Coercive Interrogation Tactics Is of National Importance in Light of Recent Proof That Such Tactics Produce Untrustworthy and False Confessions.

Scientific evidence, such as DNA analysis, is proving up a substantial body of false confession cases, resulting in reversals of homicide convictions, suspension of death row cases by the Governor of Illinois, and a spate of habeas corpus review in its wake. *See* Steven A. Drizin & Richard A.

Leo, *The Problem of False Confessions in the Post-DNA-World*, 82 N.C. L. Rev. 891 (2004). Professor Drizin's substantial work at the Northwestern University School of Law expressly connects the methodologies of interrogation tactics with false confession. *See id.* His 2004 study analyzes 125 cases with proven false confessions. *Id.* at 923-32. If the confessions are demonstrably false in light of objective scientific evidence, then the same psychological coercion tactics used in obtaining those false confessions surely have produced false confessions in a significant number of cases where post-adjudication scientific evidence is either unavailable or too costly.

The criminal justice system is confronted with a deepening abyss of problems attributable to defects in law enforcement investigative methods. The incidence of wrongful convictions attributable to these problems is the subject of intensified empirical research. *See* Series, *Tribune Investigative Report: Forensics Under a Microscope*, Chicago Trib., Oct. 17-21, 2004. Professor Drizin has demonstrated that false confessions contribute to that body of wrongful convictions. *See* Drizin & Leo, *supra*, at 901-07. The issue has been elevated to a critical highpoint with news reports of interrogation tactics practiced in Iraqi prisons and at the Guantanamo Bay encampment. It is increasingly accepted that confession evidence is not necessarily true. *See id.* at 911 & nn. 100-101 (noting that social scientists and legal scholars have "amply documented that contemporary methods of psychological interrogation can, and sometimes do, lead innocent individuals to confess falsely").

The sociological and psychological literature on interrogation tactics also is abundant, and sets forth the mechanisms by which interrogating officers extract untrue

confessions. *Id.* at 918 (concluding that "[t]he primary psychological cause of most false confessions is, therefore, the investigator's use of improper, coercive interrogation techniques"). "Indeed, modern police interrogations are so powerful that they have, at times, elicited coerced-compliant and internalized false confessions from innocent people." Christian W. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 Law & Human Behavior 469, 469 (2002).

A study published April 19, 2004, by the University of Michigan Law School, further illustrates the problem of false confessions. Samuel Gross et al., *Exonerations in the United States, 1989 through 2003*, *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.[-]pdf (accessed on Nov. 4, 2004). This study examines 328 exonerations from 38 states and the District of Columbia during that 15-year period. *Id.* at 16, 27-31. Twenty-two percent were death-row inmates, and 145 based on DNA evidence. *See id.* at 19-21. Strikingly, forty-four percent of the exonerated juveniles had confessed to the crimes. *Id.* Similarly, sixty-nine percent of the exonerees with mental disabilities had confessed. *See id.* The authors attribute the number of false confessions to the use of coercive police tactics that are designed to "frighten or deceive or break the will of a suspect." *Id.* at 19.

The *Miranda* Court in 1966 had expressly recognized the role of psychological coercion in modern interrogations. *Miranda*, 384 U.S. at 448-49. The methods enumerated in *Miranda* continue in practice and provide the core of the techniques taught to thousands of law enforcement officers at the Reid School in Chicago, Illinois. *See* Saul M. Kassin, *Human Judges of Truth, Deception, & Credibility: Confident*

But Erroneous, 23 Cardozo L. Rev. 809, 812 (2002). The indisputable linkage between interrogation tactics and the reliability of confession evidence rests at the core of this certiorari petition. The *Dickerson* Court, in its reaffirmation of the constitutional source of the *Miranda* rule, revisited the historic roots of the law of voluntariness, stating that the principle is predicated upon a common law recognition "that coerced confessions are *inherently untrustworthy*." *Dickerson*, 530 U.S. at 433. Stating that the Court has never abandoned its due process jurisprudence on the subject of voluntariness, the *Dickerson* Court wrote that coerced or compelled confessions may not be used to convict a defendant. *See id.* at 434. This standard must be reiterated as a fundamental aspect of jury trials, as well as of suppression law; a criminal defendant must constitutionally be allowed at trial to prove up evidence of coercive tactics.

Despite the unquestionably documented role of psychological coercion in producing unreliable confession evidence, Petitioner submits that it is increasingly difficult to successfully exclude evidence of confessions in cases not involving physical coercion. *See, e.g., United States v. LeBrun*, 363 F.3d 715 (8th Cir.) (*en banc*), *pet. for cert. filed*, No. 04-332 (July 8, 2004). With the increasing denial of suppression motions, it is all the more critical that this Court speak to the issue of proof of voluntariness and reliability of confessions during the trial phase.

In sum, a criminal defendant must, according to the Constitution, be allowed to introduce evidence of coercive interrogation tactics during trial. For the criminal defendant whose alleged confession has been ruled admissible, the "totality of the circumstances" test, *Dickerson*, 530 U.S. at 438-439, presupposes proof to the jury of interrogation

tactics. Only then will a defendant have a meaningful right to challenge the trustworthiness or truthfulness of confession evidence. Because voluntariness constitutionally comprises two sides of the scale -- the behavior of the interrogating officer and the circumstances of the suspect -- exclusion of Petitioner's proffered evidence left him without the full weight of the evidence available on the interrogation side of the scale. The jury was necessarily limited in its ability to evaluate the question of coerciveness.

D. This is a Suitable Case for Resolution of the Question Presented.

This case presents an opportunity for the Court to clarify that *Crane* and *Chambers* and *Blakely* extend to cases in which criminal defendants seek to introduce evidence of interrogation tactics, such as psychological coercion, as a defense to confession evidence. Certiorari is warranted even though the Eighth Circuit concluded that the district court's *Crane* error was harmless – because the Eighth Circuit failed utterly to conduct a proper harmless error analysis. More importantly, the Eighth Circuit failed to address the nationally important issues presented to it.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court said, "We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23. The *Chapman* Court held that the district court's error cannot be deemed harmless unless the Government can "demonstrate[], beyond a reasonable doubt," that the district court's exclusion of Petitioner's evidence "did not contribute to [his] conviction[]." *Id.* at 26.

The Eighth Circuit, however, did not perform a proper *Chapman* analysis. To the contrary, the Eighth Circuit simply reasoned that Petitioner's cross-examination of the interrogating agent gave the jury "sufficient information about the context of the interrogations." (App. at A21.) The Eighth Circuit also noted that "the evidence against [Petitioner] was great," without taking care to distinguish between the confession and the non-confession evidence. (App. at A21.) Most inappropriately, the Eighth Circuit reasoned that a "wholesale rejection of [Petitioner's] statements" was merely "unlikely" and that "there was more than sufficient evidence to convict [Petitioner]." (App. at A22.) These statements betray the application of a sufficiency-of-the-evidence test, of which this Court expressly disapproved in *Fahy v. Connecticut*, 375 U.S. 85 (1963).

A proper harmless error analysis would lead to the conclusion that the Government has failed to demonstrate beyond a reasonable doubt that the confession evidence did not contribute to Petitioner's conviction. *See, e.g., Crane v. Sowders*, 889 F.2d 715, 717-18 (6th Cir. 1989) (holding, following remand in *Crane v. Kentucky*, that error was *not* harmless), *cert. denied*, 493 U.S. 1094 (1990). The Eighth Circuit's failure to adhere to this Court's precedent on harmless error was an improper ending to the questions presented by Petitioner below. The court of appeals served to perpetuate the denial of Petitioner's constitutional right to present a full defense and to have a jury of his peers resolve the issue of the truthfulness and trustworthiness of the confession evidence against him. The record here requires that the case either be reversed or be reversed and remanded for reconsideration under the proper harmless error standard.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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November 10, 2004

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2255/03-2459	*	
	*	
United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
Joseph Paul Biernat,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

August 12, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2007

United States of America, *
*
Plaintiff-Appellee, *
*
v. *
*
Thomas James Martin, *
*
Defendant-Appellant. *

Appeals from the United States District Court for the District of Minnesota.

Nos. 03-2255/2459

United States of America, *
*
Appellee/Cross-Appellant, *
*
v. *
*
Joseph Paul Biernat, *
*
Appellant/Cross-Appellee. *

Submitted: February 9, 2004
Filed: May 28, 2004

Before MELLOY, FAGG and COLLOTON, Circuit Judges.

MELLOY, Circuit Judge.

Minneapolis City Councilman Joseph Biernat ("Biernat") appeals his convictions of mail fraud, causing the theft of union funds, and lying to the FBI. Thomas Martin ("Martin"), business manager for the Plumber's Union Local 15 (the "Union"), pled guilty to mail fraud and theft from a union organization. He appeals the district court's[1] two-level sentence enhancement for obstruction of justice. The government cross-appeals Biernat's two-level "minor role" reduction. We affirm.

I. FACTS

This is a public corruption case in which Joseph Biernat and Thomas Martin were accused of trading $2,700 of free plumbing services in a home owned by Biernat for Biernat's vote to put Martin on the Minneapolis Plumber's Examining Board (the "Plumber's Board").

As part of his duties as business manager of the Union, Martin managed the Union's market recovery fund. This fund was designed to subsidize member contractors so that they could bid competitively with non-union contractors. The government accused Martin of misusing the fund's resources to pay for plumbing work at six separate residences. One of these residences was owned by Joseph Biernat and occupied by his mother, Sophie Biernat. The evidence shows Martin asked Norblom Plumbing to evaluate the work needed in Mrs. Biernat's home. On the same date, Joseph Biernat voted affirmatively to forward Martin's name

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

to the city council for appointment to the Plumber's Board. Approximately two weeks later, Norblom Plumbing completed repairs on Sophie Biernat's home. Martin then authorized payment in full, in the amount of $2,700, to be drawn from the market recovery fund and paid to Norblom Plumbing.

A. Councilman Biernat

Biernat claimed at trial that he knew nothing of the payment arrangements for the plumbing and that he took no efforts to appoint Martin. However, Biernat signed two written statements for the FBI in which he admitted his illegal actions.

FBI agents first interviewed Biernat on August 1, 2001, on a related matter. An agent asked if Biernat or anyone in his family had received any improvements to real property from anyone other than family members. Biernat responded in the negative.

1. The March 7 Interview

FBI agents again interviewed Biernat on March 7 and 8, 2002. On March 7, agents in a car approached Biernat as he was on foot. The agents rolled down the window of the car, identified themselves, and said that they had some information to share with Biernat. The agents informed Biernat that meeting with them would be fully voluntary. The agents asked Biernat if he would like to return to his car. Biernat did so, then approached the agents on foot. Agent Sean Boylan ("Boylan") reminded Biernat that the meeting was voluntary, then invited Biernat to sit in the unmarked Oldsmobile Boylan was driving. Biernat accepted and sat in the front passenger seat next to Boylan, who was in the driver's seat. Agent Todd Thompson ("Thompson") subsequently joined the men and sat behind the driver's seat.

Biernat told Boylan that he was carrying laboratory samples to a doctor's office located in the Hennepin County Medical Center and suggested that Boylan accompany him while he delivered the samples. Boylan agreed, and the two men walked towards the doctor's office. Thompson stayed with the car. Another agent, Andrew Mento ("Mento"), arrived and joined the men on the walk. During their trip to the office, Biernat informed Boylan that he had contracted a stomach virus on a recent trip to Guatemala, and that the samples he was delivering were related to this condition. Biernat did not mention that he was taking Ciprofloxacin ("Cipro") for the virus. Side effects of Cipro may include anxiety, nervousness, agitation, insomnia, and nightmares.

When they arrived at the Medical Center, Biernat entered an office suite, while the agents waited outside. Biernat exited the first office suite and indicated he had to go to a different office located down the hall. The agents remained by the first office suite. When Biernat returned, Boylan asked him if there was a place nearby they could sit and talk. With Biernat's permission, the three men returned to the Oldsmobile. Biernat sat in the passenger's seat and Mento sat behind Boylan, who was in the driver's seat. The men tried to find a fast food restaurant, but failed to find one. Boylan suggested going to the FBI office, which was nearby. Biernat did not respond. Boylan interpreted Biernat's silence as a negative response and continued driving.

Biernat then suggested the cafeteria at the Hennepin County Medical Center. The men went to the cafeteria, and Boylan suggested sitting in a relatively uncrowded area in the corner of the cafeteria; Biernat agreed. Biernat walked toward one of the tables and sat down, facing a wall, with his back to the cafeteria's main seating area. With Biernat's permission, Boylan sat directly across from him. According to Biernat, he sat with a wall on his right, Mento to his left, and a large pillar behind him.

Boylan again reminded Biernat that the meeting was voluntary. Boylan then presented Biernat with information about the FBI's investigative tools and procedures and requirements for cooperation. Boylan asked Biernat to try to keep from asking questions until the end of the presentation. The presentation lasted between twenty and thirty minutes. During the presentation, Boylan showed Biernat information about a previous public corruption case targeting Minneapolis City Councilman Brian Herron ("Herron"). Boylan displayed newspaper articles about the investigation, a consensual video recording of Herron accepting a bribe, and Herron's signed statement. The agents also showed a folder with Biernat's face and name on it and suggested they had information about Biernat. The agents then left the table for several minutes.

Upon their return, the agents again advised Biernat that his presence was voluntary. They also asked him if he wanted something to eat or drink or if he needed a bathroom break. Defendant answered, "No, let's keep going." The agents then began to question Biernat as to whether he had done anything illegal in his position as a councilman. Biernat told the agents that he had received a free kitchen upgrade in 1993 and that he had not declared the value of the improvements on his taxes. He also told the agents that his mother's home had a plumbing problem and that he had mentioned the problem to Martin in the fall of 1998. Biernat said that Martin had arranged to have repairs done by union plumbers sometime between late 1998 and mid-1999. Biernat admitted that he did not pay for the repairs and that he knew it was illegal not to do so.

After Biernat had given them this information, the agents reduced Biernat's statements into a written statement. They asked him to sign the statement if it was true. Biernat read and edited the statement. The first paragraph of the statement reads: "By reviewing the statement, initialing each page and signing the statement, I acknowledge that no one

has threatened, coerced or promised me anything." Biernat made changes to the statement. For example, Biernat inserted "I asked Martin about the bill and he said he'd get it which means it would be forthcoming." Biernat also changed the description of his failure to declare the value of the plumbing work from "illegal" to "unethical."

Boylan testified that Biernat appeared ill on March 7. However, Boylan testified that Biernat seemed alert, responded appropriately to questions, and had no apparent difficulty concentrating. Biernat made two follow-up calls to Boylan, whom he refered to as "Sean." During the first call, Biernat left his wife's cell phone number on Boylan's voicemail, explained his plans to take his son to the barber, and said he would call back with his pager number. Later that afternoon, Biernat called back and left the pager number.

2. The March 8 Interview

On the morning of March 8, Biernat telephoned his brother, Leonard Biernat, to discuss the situation. Leonard is a licensed attorney, but he has not actively practiced law since 1985. He is a member of the Minnesota House of Representatives and teaches ethics and family law at Hamline Law School. Leonard went to Biernat's home at 10:30 a.m.

Boylan telephoned Biernat around 10:50 a.m. and asked him if he would meet with the agents for a second time. Boylan stated that this meeting would be voluntary. Biernat agreed and decided the agents should come to his home. Boylan and Agent Timothy Bisswurm ("Bisswurm") agreed to meet him there. During the telephone conversation, Biernat stated that his brother was with him, and that Leonard was a lawyer and a friend, and had asked to be present. According to Boylan, he said he would arrive between 12:30 and 12:45 p.m. According to Biernat, Boylan said he would arrive in about fifteen minutes. Leonard left the house around 1:00

p.m., believing the agents were not coming. Before he left, he advised his brother not to sign anything during his meeting with the agents.

Minutes later, Boylan and Bisswurm arrived at the Biernat household. Biernat greeted the agents at the door and led them to the living room. Biernat sat on the couch, and Boylan sat next to Biernat. Bisswurm sat across from the two men. Mrs. Biernat soon joined them in the livingroom, and she sat next to Bisswurm. Boylan reminded the Biernats that the meeting was voluntary and that they did not have to talk to the agents. According to Boylan, Biernat replied that he had heard that a lot yesterday. Later, during the meeting, he said he was sick of hearing it. Biernat said that he wanted his brother present. The agents did not inquire as to whether Biernat was represented by counsel, and Biernat never claimed that Leonard was acting as his attorney.

Mrs. Biernat asked the agents if they needed an attorney present. Boylan responded that it would be inappropriate for the agents to give any advice in that regard and that the Biernats had to make their own decision. The meeting then proceeded. Mrs. Biernat left the meeting several times to answer the telephone. She also offered the agents water, which she retrieved from the kitchen.

Biernat and the agents revisited the subject of the free plumbing Biernat had received, and the agents again reduced Biernat's statement to a written statement. At 3:25 p.m., Biernat began to review the written statement. Biernat showed the statement to his wife. Biernat edited the statement. Again, he added language stating that he had asked Martin about a bill, and Martin had said it would be forthcoming. Biernat changed "I knew I (owed) him and if I didn't vote for Martin he could expose my illegal activity of accepting the free work" to "I knew I was obligated to him . . .", among other things. After Biernat reviewed the

statement for thirty minutes, Boylan placed a telephone call and then advised Biernat that the agents would have to leave in about ten minutes. Biernat stated that if he hired an attorney, an attorney would tell him not to sign the statement. Boylan again said the meeting was voluntary, and that he could not advise him on the issue of an attorney.

Biernat claims that the agents threatened to "make his life a living hell" if he did not sign the statement. The agents deny having made this threat. Biernat also claims that agents threatened to involve Biernat's seven-year-old son, his son's teacher, his elderly mother, and his neighbors in the investigation. Agent Boylan admits he said that an investigation might involve talking to Biernat's son's teacher and Biernat's neighbors, but denied making any threats.

Biernat signed the statement. As with the statement from the previous day, a paragraph included in the statement said that signing it was an acknowledgment that the statement was voluntary, and that Biernat had not been threatened, coerced, or promised anything in return for signing the statement.

The district court found that agents made no show of force or intimidation and did not make any threats or promises in order to obtain a statement. In particular, the district court found that the agents did not make threats with respect to Biernat's son and school teacher or the neighbors. Bisswurm carried a firearm during the meeting, but the agents made no reference to the weapon, and no firearms were ever brandished. The district court found that Biernat was coherent throughout the interview and that he was not impaired by illness or the effects of medication. The meeting was about three and one-half hours long.

In sum, the March 7 and 8 statements admitted the following: Biernat admitted that he asked Martin about some

plumbing problems at his mother's home. Biernat stated that Martin caused Union plumbers to do repairs at the home, and that Martin knew these repairs were worth at least $1,000. Biernat admitted that he did not pay for the work and that he knew it was illegal not to pay for the plumbing work he had received. However, he stated that he asked Martin about the bill and that Martin said it would be forthcoming. Biernat also admitted that he felt obligated to vote for Martin's appointment to the Plumber's Board, because Martin could expose the fact that Biernat had received Union plumbing work and never paid for it. Biernat also noted that Martin's appointment was a consent item on the agenda.

3. The District Court Proceedings

The district court found that Biernat's written statements were voluntary, and that Miranda warnings were not required because the interviews were noncustodial. The district court also excluded certain evidence relating to the circumstances of the interviews. The district court held that, because it had found Biernat's statements voluntary, "interrogation tactics or evidence relating to the voluntariness determination are inappropriate and will not be the basis for a cross-examination of [the interviewing agent]."

After a jury trial, Biernat was convicted of mail fraud, in violation of 18 U.S.C. §§1341 and 1346, causing the theft of union fund, in violation of 29 U.S.C. §501(c)/18 U.S.C. §2(a) & (b), and lying to the FBI, in violation of 18 U.S.C. §1001. Biernat was acquitted of violating the Hobbs Act. He was sentenced to 21 months imprisonment.

B. Thomas Martin

Martin's appeal focuses on the two-level adjustment for obstruction of justice he received at sentencing. The government makes two main arguments in support of the

obstruction of justice enhancement in Martin's case. First, the government argues that Martin, in a taped conversation, stated his intention to destroy documents, and that in fact these documents were never produced nor otherwise discovered. Second, the government contends that Martin tried to cover up free plumbing work performed at the home of his sister, Elizabeth Hinton, and her husband, Daniel Hinton, by attempting to create a paper trail evidencing payment for the work, and then failing to produce a relevant document in response to a government subpoena.

1. The February 18, 2002 Conversation

On February 18, 2002, Martin met with Jeff Norblom, who wore a wire in cooperation with the FBI. A transcript of the recording was admitted into evidence. According to the transcript, Norblom told Martin that Department of Labor Investigator Mary Agnew had subpoenaed documents regarding the use of the Union's fund to provide free plumbing work. Norblom showed the requested documents to Martin. Martin repeatedly told Norblom to cooperate with the requests and tell the truth. During the conversation, Martin asked if they were being recorded. Norblom assured him they were not, and the conversation continued.

Towards the end of the conversation, the following exchange occurred:

Martin:	Alright. Now what are these?
Norblom:	This is my drawing on the house.
Martin:	Okay.
Norblom:	That's the order for the fixtures.
Martin:	Okay. Okay. Okay. Now. Tell her the truth. Tell her everything I told you to do.
Norblom:	So, okay, so basically tell her that, that so lie to her just say that doesn't —
Martin:	No. Don't lie to her.

Norblom: — exist. [sic] Okay, that doesn't exist.
Martin: Don't lie to her.
Norblom: What, what, what's gonna happen to that?
Martin: I am probably going to tear it up.
I know I am.
Norblom: Alright.
Martin: Are there any other copies of this?
Norblom: No, that's it.

The government argues that the documents at issue in the above exchange were not produced in response to the Department of Labor subpoena, were not found during a search of the Union's office, and were not found since.

2. The Hinton Check

The government also contends that Martin tried to cover up the fact that his sister and her husband never paid for the plumbing work done on their home. On approximately February 18, 2002, Martin told Daniel Hinton that the Union was looking at records, and requested that Hinton pay the Union for the plumbing work performed in 1999. Martin told Daniel Hinton to write two checks—one including interest and the other not including interest—and to backdate the checks by a day or two. Martin told Daniel Hinton that if anyone asked about the checks, Hinton was to tell them that he "was just finally getting around to paying for the plumbing work done in 1999." Daniel Hinton did not have enough money in his checking account to cover the payment, and Martin gave him $3,500 in cash to cover the checks. Daniel Hinton complied and wrote two checks, both of which he backdated.

On February 28, 2002, the Department of Labor subpoenaed documents from the Union, including "All records for all payments issued by the Union to Norblom Plumbing for advertising, work completed by Norblom

Plumbing for Dan and Elizabeth Hinton, . . . Sophie Biernat, . . . and the $3,000 payment issued by Local 15 to Norblom Plumbing in December 1999." On March 6, 2002, Martin produced certain documents requested in the subpoena including a note signed by Daniel Hinton promising to pay $6,000 to the Union. The next day, law enforcement agents executed a search warrant at the Union's offices and seized a copy of a $6,540 check payable to the Union, dated February 17, 2002, and signed by Daniel Hinton.

3. The Plea

Martin pled guilty to mail fraud and theft from a union organization. At sentencing, the district court applied a two-level enhancement for obstruction of justice, pursuant to USSG section 3C1.1. The district court stated that the enhancement was based on three separate incidents. The district court discussed the taped conversation, and rejected Martin's argument that he was entrapped. The district court then stated:

> But putting aside that incident which I think is subject to a couple varying interpretations, I'm still left with solid evidence with regard to the Hinton transaction of cash distribution, a backdating of checks, and apparently issued note stuck later in the file after the subpoena had been issued, to convince me that there was a scramble that was taking place to cover up and obstruct justice by tinkering with the records and the documents, and for those reasons, I think under the circumstances the Government prevails upon its request for an obstruction of justice enhancement.

In his plea agreement, Martin reserved the right to argue that his two-level increase for obstruction of justice was unwarranted. Applying the obstruction of justice and other adjustments, the district court arrived at a sentencing range of

twenty-four to thirty months, and sentenced Martin to twenty-four months. Without the obstruction of justice enhancement, the sentencing range would have been eighteen to twenty-four months.

II. DISCUSSION

A. Joseph Biernat

1. March 7 and 8 Statements

Biernat claims that the district court erred in failing to suppress the statements made on March 7 and 8, 2002. He contends that the statements (1) were involuntary and made as a result of his weakened capacity to resist police pressure to confess and (2) were made in violation of his Miranda rights.

a. Voluntariness

i. Standard of Review

"We review the district court's findings of fact for clear error and its legal conclusion as to whether a confession was voluntary de novo." United States v. LeBrun, 363 F.3d 715, 724 (8th Cir. 2004) (en banc).

ii. Analysis

"To decide the voluntariness of a confession, we examine the totality of the circumstances to determine whether pressures exerted by the authorities overwhelmed the defendant's will." United States v. Rodriguez-Hernandez, 353 F.3d 632, 636 (8th Cir. 2003) (internal quotations and citation omitted). "Obviously, interrogation of a suspect will involve some pressure because its purpose is to elicit a confession." United States v. Astello, 241 F.3d 965, 967 (8th Cir. 2001).

Using time pressure to elicit cooperation does not make a confession involuntary. See id. Further, "'a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne.'" Id. (quoting Jenner v. Smith, 982 F.2d 329, 334 (8th Cir. 1993)). "Rather, the coercive conduct must be `such that the defendant's will was overborne and his capacity for self-determination critically impaired.'" United States v. Santos-Garcia, 313 F.3d 1073, 1079 (8th Cir. 2002) (quoting Astello, 241 F.3d at 967).

Considering the totality of the circumstances, we find that Biernat's confessions were voluntary. The agents' actions, while perhaps not at all times straightforward, were not so coercive as to overcome Biernat's will or critically impair his capacity for self-determination. Biernat argues that he had a weakened capacity to resist the pressure to confess because of his stomach ailment and medication. However, the district court found that Biernat was not suffering from any significant physical or mental impairment as a result of illness or medications during his interviews. This finding is not clearly erroneous, and is upheld. We are therefore unpersuaded by Biernat's weakened capacity arguments. Biernat also argues that the exclusion of his brother, Leonard, from the meeting on March 8 weighs against the voluntariness of his statement of that date. However, the Biernats never requested the assistance of counsel, and never informed agents that they were represented by Leonard Biernat. The fact that Leonard was not present does not tip the scales and render Biernat's statements involuntary. We also note that Biernat is a sophisticated individual who holds a college degree, was involved in city government, and was not especially susceptible to the interrogator's pressures because he lacked maturity or education. See Withrow v. Williams, 507 U.S. 680, 693-94 (1993).

b. Miranda

i. Standard of Review

We review a district court's custody determinations de novo. LeBrun, 363 F.3d at 719. "'[I]n reviewing "in custody" determinations, we uphold findings of historical fact unless clearly erroneous, but we apply the controlling legal standard to the historical facts utilizing an independent review.'" Id. (quoting United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002)).

ii. Analysis

The United States Supreme Court ruled in Miranda that a person "taken into custody or otherwise deprived of his freedom of action in any significant way" must be warned "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" before law enforcement officers begin questioning Miranda v. Arizona, 384 U.S. 436, 444 (1966). The parties agree that Biernat did not receive Miranda warnings before making his March 7 and 8 statements. The government claims that no warnings were necessary because Biernat was not in custody. Biernat contends he was in custody and a warning was required, and his statements should be suppressed.

We therefore must determine whether Biernat was in custody during his interviews with the FBI on March 7 and 8, 2002. "'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" LeBrun, 363 F.3d at 720 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)). "[T]he initial determination of custody depends on

the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323 (1994).

To assess whether an interrogation was custodial, our court commonly uses six non-exhaustive indicia of custody. The presence of the first three indicia weighs against the existence of custody, while the presence of the latter three indicia supports the existence of custody. Axsom, 289 F.3d at 500-01. These indicia are:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990).

We uphold the district court's findings of fact regarding the circumstances of Biernat's two interviews with FBI agents as not clearly erroneous. See Axsom, 289 F.3d at 500. Considering a totality of the circumstances, we find Biernat's interview on March 7, 2002 was noncustodial. First, agents informed Biernat at least four times that his participation in the interview was voluntary. Biernat knew

that he was not under arrest and that he was free to leave. Second, Biernat was not physically restrained by the agents. His freedom was unrestricted beyond the ordinary confines of being seated at a table in a public cafeteria. Third, Biernat voluntarily acquiesced to the FBI agents' requests to speak with him and participated in determining where the meeting was to take place. Fourth, the agents did not use strong arm tactics during the interview. While agents did discuss FBI surveillance techniques and imply they had information about Biernat, this type of coercion does not render the interview custodial. See LeBrun, 363 F.3d at 721 ("[S]ome degree of coercion is part and parcel of the interrogation process and . . . the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart.") Fifth, the atmosphere of the interview was not police-dominated. Two agents interviewed Biernat in a public place. Sixth, Biernat was not placed under arrest at the conclusion of questioning.

We also find that the interview on March 8, 2002 was noncustodial. First, Biernat was informed multiple times that the interview was voluntary. Second, Biernat and his wife were free to move around their house during the interview, and did so. Third, Biernat voluntarily acquiesced to the interview and participated in determining that the meeting would take place in his home. Fourth, no strong arm tactics were used. No weapons were brandished and no threats were made. The agents ultimately put a ten-minute deadline on signing the statement; however, this deadline fails to render the interview custodial. Fifth, the interview occurred in Biernat's home, with his wife present, and in the presence of only two officers. Sixth, Biernat was not placed under arrest at the termination of questioning.

The March 8 interview bears a resemblance to the interview conducted in Axsom. In that case, agents executed a search warrant at Axsom's home at 6:45 a.m., seeking evidence of child pornography. Axsom answered the door wearing only a towel, and nine federal agents entered his home. Several weapons were in the home, and the agents secured these weapons. Agents then escorted Axsom to his bedroom to dress. Agents interviewed Axsom in his living room without informing him that the questioning was voluntary and without giving him a Miranda warning. During the interview, Axsom was not allowed to get up to get himself a glass of water, and an agent escorted him to the bathroom. Axsom was issued a citation for marijuana possession at the end of the interview, but was not arrested. This Court found that under the circumstances of Axsom's interview, "a reasonable person would have felt he was at liberty to terminate the interrogation and walk away or turn his back on the agents." Axsom, 289 F.3d at 503. This is despite the fact that nine officers came to his home early in the morning, did not inform him that the interview was voluntary and he was free to leave, and restricted his freedom of movement throughout the encounter. Given this precedent, Biernat's interview, which included none of the aggravating factors present in Axsom, was clearly noncustodial.

2. Exclusion of Evidence

a. Standard of Review

We review the lower court's ruling to admit or exclude evidence for an abuse of discretion. See United States v. Carroll, 207 F.3d 465, 470 (8th Cir. 2000).

b. Analysis

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). This right includes the right to present certain evidence concerning a confession. However, "[o]nce the court makes a preliminary determination that the confession is voluntary, then the only requirement is that the defendant be allowed to place the statements in context." United States v. House, 939 F.2d 659, 663 (8th Cir. 1991).

In Crane, the defendant was on trial for murder and moved to suppress his confession. 476 U.S. at 684. The trial judge held a suppression hearing and found that the confession was voluntary and should not be suppressed. Id. At trial, the defendant "sought to introduce testimony about the physical and psychological environment in which the confession was obtained," to suggest that the confession was not credible. Id. The trial court excluded the evidence, finding that it pertained solely to the issue of voluntariness. Id

The Supreme Court reversed, finding that "evidence surrounding the making of a confession bears on its credibility as well as its voluntariness," id. at 688 (internal quotations omitted), and "the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial." Id. Thus, even if a trial court has already ruled on the constitutional question of voluntariness, a defendant is still free to present to the jury "circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness." Id. (internal citation and quotation marks omitted).

In the present case, as in Crane, Biernat moved to suppress his confession. The trial court denied Biernat's motion, finding his confession voluntary. At trial, the district court ruled that it would allow evidence relating to "the

circumstances, context, the milieu surrounding the taking of the statements," but not allow "questions relating to coercion or whether or not the statements made were involuntarily made." The district court further stated that "interrogation tactics or evidence relating to the voluntariness determination are inappropriate and will not be the basis for a cross-examination of the agent." However, the district court then proceeded to allow the defense to extensively cross-examine the agent who had conducted the interrogation. The cross-examination filled 125 pages of the transcript, while the direct examination of the same agent filled only 89 pages.

Thus, while the district court's ruling allowed evidence regarding "the circumstances, context, the milieu surrounding the taking of the statements," the ruling disallowed any evidence relating to coercion or voluntariness. This judgment is difficult to square with Crane, which instructs that it is an incorrect assumption "that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories." Id. at 687. Instead,"the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual." Id. at 688.

However, we need not square the present case with Crane because any error that may have occurred was harmless. See Id. at 691 (harmless error applies to whether exclusion of evidence was a violation of the right to present a full defense). The defense engaged in a lengthy cross-examination of the agent, giving the jury sufficient information about the context of the interrogations. In addition, the evidence against Biernat was great. Though the defense argues that Biernat was in ill-health and put in compromising positions when interrogated, the evidence is not so strong that it leads one to believe that Biernat falsely confessed. He was not forced to speak with the agents, he

was not physically threatened, and he had some measure of control over the interview process. When presented with written statements to sign, Biernat was alert enough to make several revisions, striking out parts the agent had written and inserting his own language. Without the unlikely scenario of a wholesale rejection of Biernat's statements by the jury, there was more than sufficient evidence to convict Biernat on the counts relating to the free plumbing services he received. Therefore, any erroneous statement of law made by the district court was harmless.

3. The False Statement Conviction

a. Standard of Review

We review de novo the sufficiency of the evidence to sustain a conviction, viewing the evidence in the light most favorable to the verdict. United States v. Fitz, 317 F.3d 878, 881 (8th Cir. 2003).

b. Analysis

Biernat was convicted of making a false statement to an FBI agent in violation of 18 U.S.C. §1001. The basis for this conviction was an answer he gave in the interview conducted on August 1, 2001, as part of an investigation of another official, Brian Herron. During this interview, an agent interrogated Biernat with the guidance of a set of model questions. The last of these model questions reads: "Since entering public employment, have you or any of your family members asked for or received any improvements to any real property owned or occupied by you or your family members (including children and parents)?" At trial, the agent testified that he followed the written questions "just about to the letter" during the interview and that he asked Biernat "if the councilman or anyone in his family had received any improvements to real property from anyone other than his

family members." He also testified that properties owned or occupied by the councilman were included in this question. He testified that Biernat replied in the negative by saying "no.

On appeal, Biernat attempts to show that a one-word answer to a complicated question is insufficient to sustain a conviction for making a false statement. However, the authority he cites does not support this position. Biernat cites to United States v. Vesaas, which holds that a conviction cannot stand when it is based on the response to"an ambiguous question where the response may be literally and factually correct." 586 F.2d 101, 104 (8th Cir. 1978). In that case, the defendant had been asked whether he held stocks in joint tenancy with his deceased mother. He responded that he did not. In fact, he owned the stocks, and had owned them in joint tenancy with his mother before her death. Id. However, because it is legally impossible to own anything in joint tenancy with a dead person, his response was literally true. Other cases Biernat cites have similar factual situations: in each, the answer could be construed as false, though it was literally true. Biernat is in a different situation. There is no way that his answer to the question could be understood as true. Though it is a complicated question, it is not so "confusing and ambiguous," id. at 104, that the answer of "no" could be found literally true.

B. Thomas Martin

1. Standard of Review

"We review a district court's factual findings in support of an obstruction of justice enhancement for clear error." United States v. Flores, 362 F.3d 1030, 1037 (8th Cir. 2004) (quoting United States v. Molina, 172 F.3d 1048, 1058 (8th Cir.1999)). "We review the application of the sentencing guidelines to the facts de novo." Id. (quoting United States v. O'Dell, 204 F.3d 829, 836 (8th Cir. 2000)).

2. Analysis

The Guideline concerning obstruction of justice reads:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S. Sentencing Guidelines Manual §3C1.1 (2003). A non-exhaustive list of examples of conduct to which this section applies appears in Application Note 4. This list includes "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." Id. § 3C1.1 cmt. n.4(c). It also lists the following conduct as falling under the section:

> [D]estroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

Id. § 3C1.1 cmt. n.4(d).

On appeal, Martin argues that an obstruction of justice enhancement requires proof of illicit wilfulness and materiality and that the government did not meet this burden of proof. He also argues that the obstruction of justice enhancement should not apply because the government was not prejudiced by his actions. We find these arguments unpersuasive.

First, Martin argues that his conduct was not willful. Martin correctly points out that the term "willful" has a "a 'wide variety of definitions'" in the case law. United States v. Oppedahl, 998 F.2d 584, 585 (8th Cir. 1993) (citation omitted). However, it is difficult to imagine a definition of "willful" that would exclude Martin's conduct here. Even the cases Martin cites put Martin's actions squarely in the category of "willful" behavior. As stated in one such case:

> It is true that the guideline text incorporates a requirement of "willful" conduct. Indeed, we have recognized that "the term 'willfully' should be reserved for the more serious case, where misconduct occurs with knowledge of an investigation, *or at least with a correct belief that an investigation is probably underway.*"

Brown v. United States, 169 F.3d 531, 536 (8th Cir. 1999) (quoting Oppedahl, 998 F.2d at 586). Martin's conduct was the "more serious case." Martin clearly knew or believed an investigation was underway when he stated he planned to destroy evidence. In fact, the government subpoena was the subject of the taped conversation in which he made those statements. Arranging payment by Daniel Hinton happened subsequently, so Martin also knew of the investigation when he told Daniel Hinton to backdate the checks.

Next, he argues that "[i]f Mr. Martin's conduct did not

impede the investigation in a material way, he did not obstruct justice." Here, Martin attempts to apply an exception to his case that is only available for those who destroy or conceal documents contemporaneously with arrest. Section 3C1.1's Application Note 4(d) states that destroying or concealing evidence constitutes obstruction,

> however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender[.]

Because Martin's actions were not contemporaneous with arrest, the exception cannot apply.

In addition, Martin argues that backdating the checks was "mere tinkering" and did not warrant the obstruction of justice enhancement. However, we find the backdating of the check qualified as "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding," which is expressly included under the obstruction of justice guideline. U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n.4(c).

C. The Government's Cross-Appeal—Biernat's Minor Role Adjustment

1. Standard of Review

"It is well-established that a district court's determination of whether a defendant was a minor participant may only be reversed if clearly erroneous." United States v. Johnson, 358 F.3d 1016, 1017 (8th Cir. 2004). "A finding is

clearly erroneous when the reviewing court, on the basis of all the evidence, is left with the definite and firm conviction that a mistake has been made." United States v. Wells, 127 F.3d 739, 745 (8th Cir. 1997).

2. Analysis

Biernat was sentenced as a "minor participant" in the crime, and thus received a two-level decrease in his offense level at sentencing. A minor participant is one "who is less culpable than most other participants, but whose role could not be described as minimal." U.S. Sentencing Guidelines Manual § 3B1.2 cmt. n.5. A defendant whose participation is minimal is "plainly among the least culpable of those involved in the conduct of a group" and this deduction is used when the defendant lacks "knowledge or understanding of the scope and structure of the enterprise and of the activities of others." Id. § 3B1.2 cmt. n.4.

The government argues that Biernat did not deserve the two-level adjustment. "The propriety of a downward adjustment is determined by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable and by measuring each participant's individual acts and relative culpability against the elements of the offense.'" Johnson, 358 F.3d at 1018 (quoting United States v. Ramos-Torres, 187 F.3d 909, 915 (8th Cir. 1999)).

At sentencing, the district court stated its reasons for awarding Biernat the two-level adjustment. The district court found that the scheme to provide free plumbing was Martin's idea, and that it was Martin who was the motivating factor behind it. While Martin arranged for the plumbing

work to be done, and Martin arranged for payment to be drawn from the Union's market recovery fund, Biernat was a passive recipient of these services. The district court therefore found that Biernat was less culpable than Martin, and applied a two-level adjustment to Biernat's sentence. We agree with the district court's analysis and find that the district court's application of the minor role adjustment was not clearly erroneous.

We therefore affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA

vs.

JOSEPH PAUL BIERNAT

CRIMINAL ACTION
NO. 02-127(2) (ADM/AJB)

Courtroom 13 West
Thursday, November 14, 2002
Minneapolis, Minnesota

JURY TRIAL PROCEEDINGS
DAY 8

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE
AND A JURY

APPEARANCES:

For the Government:

OFFICE OF THE LLP
U.S. ATTORNEY
By: Mark D. Larsen
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For the Defendant:

DORSEY & WHITNEY,

By: Janice M. Symchych,
Esquire
Kimberly A. Fuhrman,
Esquire
50 South Sixth Street -
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Minneapolis, MN 55402-1498

* * *

(8:45 a.m.)

PROCEEDINGS

IN OPEN COURT

(Defendant present)

(Without the jury)

THE COURT: The record should reflect that we are outside the presence of the jury.

At the conclusion of yesterday's testimony, the Government rested its case-in-chief which brings us to the juncture where Ms. Symchych has indicated she has some directed verdict motions and I'll hear you in that regard first.

MS. SYMCHYCH: Your Honor, I have Rule 29 motions and two others that I just want to state very briefly on the record which I just kind of want to get out of the way.

THE COURT: All right.

MS. SYMCHYCH: The first is a motion to renew our motion to exclude the statements of Joe Biernat and for a mistrial regarding their admission before the jury.

The FBI agent who has been the proponent of those statements in court testified that the written contents which have been admitted do not truly and fully reflect what was said by Joe Biernat during the conversations, and I think that there is evidence in the record before the jury about the fact that it took almost eight hours before he finally signed them at the end of the day on March 8th, so we renew that motion.

The second motion is to renew our request to cross-examine Sean Boylan with the pattern of interrogation that he used in the Norblom and Czichray statements under 404(b),

not as a character issue, but as evidence of his pattern of conduct. And 404(b) evidence is admissible on the issue of credibility. We're not trying to prove character. We're trying to have pattern evidence and planning evidence that goes to credibility. So those are the two evidentiary motions.

The Rule 29 motions I do want to go through in some detail.

THE COURT: I think maybe what we'll do is clear the decks on the evidentiary motions and then move on to the Rule 29 motions.

Mr. Larsen, do you want to be heard on the -- I think motion one is probably a dual motion to exclude or suppress as well as a motion -- I did hear the word "mistrial" in there, so I guess there's two motions there as well as the pattern and practice 404(b) evidence.

MR. LARSEN: Yes, your Honor. The Government is comfortable with the notion that these statements that have been recounted both orally by Special Agent Boylan and the statements that he has authenticated that come to us by way of written format signed by Mr. Biernat are accurate and correctly recount an overview of what was taking place throughout the course of two interviews, one that was about four hours long on the 7th and one of which was about I think three and a half if not just a little bit longer on the 8th.

I've not yet participated in a trial where I don't think to my recollection any agent has ever been on the stand purporting to set forth a verbatim, syllable-by-syllable recitation of what took place with respect to a prior interview, and the Government sees this case and its presentation as essentially no different in substance than the normal practice. So there's no contention made that what the agent said is a verbatim recitation, but rather the substance of what Mr. Biernat had set forth throughout the course of those two interviews. There's no claim by the United States that it's a verbatim recitation, and accordingly, in our view, at least, nothing to exclude in that regard.

The mistrial I think rises and falls with the same analysis. I think this case can go to the jury and should go to the jury based in part upon the evidence consisting of what Agent Boylan testified to.

With respect to the Rule 404(b) motion that's been made on Jeffrey Norblom's prior conversation with the agent and the **Czichray** case, the Government understands the Federal Rules of Evidence to have specific purposes, chapter by chapter, so to speak, and it's our recollection that the Rule 600 series addresses issues of impeachment, credibility and whatnot, not Rule 404(b). Given the purpose for which the defense has sought to introduce this evidence, that is, a pattern of unconstitutional conduct, we think that the Court has ruled upon that and that no further inquiry is needed along those lines and no further evidence is required along those lines.

With respect to the notion that analyzing the record that's been brought forward to date is sufficient, I think the defense has made all the arguments that they want to make. I think there's been a lot of cross-examination of the agent about the facts and circumstances here and more than adequate opportunity for the defense to make an appropriate record and argue their points to the jury.

THE COURT: As to the evidentiary motion regarding the motion to exclude or suppress the statements of March 7th and March 8th, this matter was subject to an extensive, full-blown exploration of the issues surrounding the voluntariness in the taking of the statements in a lengthy order addressing that testimony by Magistrate Judge Boylan. I have reviewed that as well as the testimony which I have heard live and in person in front of me instead of just the transcript review and do find that the motion to suppress was and has been and remains denied. I do find that the procedure comports with the dictates of the Constitution and the constitutional requirements were fully met, so they could not be suppressed for that reason.

Nonetheless, in light of the dictates of 18 U.S.C. 3501, I have allowed defense counsel latitude to explore and set the scene surrounding the voluntariness issues of that and the jury has heard with regard to the taking of the statements many of the circumstances surrounding it.

The fact that the statements of March 7th and March 8th may not be comprehensive of everything uttered or spoken of during the lengthy sessions of discussions between the defendant and the agents is not uncharacteristic of such statements in virtually every case. I think the statements frequently are summaries and maybe not all-inclusive and I think the breadth of the testimony surrounding those has explored those areas appropriately.

As to the 404(b) motion of the defense to allow Agent Boylan to be confronted with pattern-and-practice evidence of other interviews in this case, that is, a related issue with regard to Norblom or an unrelated case, that is, of defendant Czichray, I don't find that to be a 404(b) purpose envisioned within the rules and appropriately admissible. The 404(b) evidence which has been admitted against Government witnesses, I think the case histories of those cases are largely dealing with informant-type witnesses or other bad acts amounting to criminal behavior and not interrogation tactics.

After a review of the **Czichray** decision, the Court notes that the finding of Judge Tunheim in that regard was that the statement was unconstitutionally taken, but did not arise to the level of being involuntary and I don't think for those reasons it shows a pattern and practice. Obviously every circumstance and case is different and must rise or fall on its own merits. And so therefore, the renewal of the offer to introduce 404(b) evidence relating to investigative interviewing tactics of Special Agent Boylan is denied.

All right. I think we've made a clear record of those issues, so let's move on to the Rule 29 directed verdict issue.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA
vs.
JOSEPH PAUL BIERNAT

CRIMINAL ACTION
NO. 02-127(2) (ADM/AJB)

Courtroom 13 West
Friday, November 8, 2002
Minneapolis, Minnesota

EXCERPT TRANSCRIPT FROM
JURY TRIAL PROCEEDINGS
DAY 5

[TESTIMONY OF: SEAN E. BOYLAN]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE
AND A JURY

A P P E A R A N C E S:

For the Government:

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By: Mark D. Larsen
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Kimberly A. Fuhrman,
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* * *

(11:25 a.m.)

IN OPEN COURT

(Without the jury)

THE COURT: All right. Please be seated. We'll have you both at counsel table momentarily here while I clarify some of the bounds of the loose ends of last night's discussion.

After the testimony yesterday and outside the presence of the jury, we had an argument on various legal issues which were pending. Some of those I ruled on at the time, particularly the Government's 404(b) motion regarding the 1993 construction work, and we had argument regarding the defense corollary motion, 404(b) evidence regarding the testifying witness, Special Agent Boylan's involvement in other cases as well as the permissible bounds, if you will, of the cross-examination of his conduct in this case.

After a review of 404(b), my prior orders and 18 United States Code, Section 3501(a), I think it appropriate at this juncture to give counsel further clarification as to what areas I see appropriate for cross-examination at this time since it's prior to the beginning of the defense cross-examination and I have now had the opportunity to hear the direct examination of Special Agent Boylan.

As counsel know, 18 U.S.C. 3501 states that: "If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

The Eighth Circuit has held consistent with the dictates of **United States** vs. **Huddleston** and a number of

cases in other circuits, of course, that after a confession has been determined by a court to be voluntary, the only requirement is that the defendant be allowed to place the statements in context.

I want to make sure that the record and counsel are aware of the fact that I have ruled, rightly or wrongly, on the issue of voluntariness. That is not an issue for the jury. It may well be an issue for the Eighth Circuit at a later time. Right or wrong, that will have to be determined in another forum and not through the jury in this case.

Therefore, I am going to allow the defense full latitude to explore the circumstances, context, the milieu surrounding the taking of the statements, but I will not allow questions relating to coercion or whether or not the statements made were involuntarily made. As I said, the law of the case is that this is a voluntary statement and it complies with the Constitution, so the ruling is that the statement is voluntary and therefore interrogation tactics or evidence relating to the voluntariness determination are inappropriate and will not be the basis for a cross-examination of the agent.

That leaves us, I think, then, with the issue of conduct in other cases and how that relates to 404(b) evidence. I did try to look at 404(b) evidence with fresh eyes. It is interesting that 404(a) clearly talks about witness conduct and then as it relates to (b) it seems to relate to defense conduct and talks more about prosecution in a criminal case shall give reasonable notice and indicates in (a)(3) that evidence of the character of a witness is controlled by Rules 607, 608 and 609, and I think those primarily serve as the basis.

But for purposes of argument, considering whether 404(b) evidence might be admissible, that is, conduct of the agent in cases other than the case at hand, I think we have to start with the point of for what purpose is that conduct offered, which is the threshold issue under 404(b).

In looking through the defense pleadings and in light of the argument yesterday, I think the defense purpose, as I understand it, is to -- and I think the memo says that Special

Agent Boylan's prior acts should be examined on the question of voluntariness becauses of a fight over -- and then I think the quote is whether those statements were taken in violation of constitutional rights. I don't think that that is within the dictates of the 404(b) purpose. It seems to me to comport more with showing that Agent Boylan is acting in conformity with prior behavior. And clearly, 404(b)'s first sentence is: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with his prior behavior."

So, absent a purpose, an identified purpose that falls within the specific purposes set forth in the second sentence of 404(b), that is, whether it's proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absent a mistake or accident, I don't see this evidence as conforming to that.

So, in light of the status of the record so far, I am going to deny the defense request to seek testimony of 404(b) evidence, other bad acts, if you will, under the rubric of the rule with regard to this witness.

Now, if after the conclusion of the testimony relating to the taking of the statements or other areas that are appropriate, the motion you think indicates a different basis or you want to offer to me a basis for which they're received for one of the permitted purposes, I'll be happy to hear you outside the presence of the jury, but at this time I'm going to restrict the cross-examination as I've just described.

All right. I think we're ready to summon the jury.

MS. SYMCHYCH: Your Honor, before we do, it is my understanding that we should be allowed to elicit for the jury whether Joe Biernat said the things that Agent Boylan says he said. Agent Boylan testified he said them voluntarily and without coercion and there's a fact issue about what was said and what went on that day, and I am not sure if your order right now intends to deprive my client of the chance to

present the circumstances that we would say pressured him to make the statements that Agent Boylan said he did.

THE COURT: I'm allowing you latitude to explore the circumstances, context, what happened at the particular interviews that led to these statements. Anything that seems to be cast more in the coercion context -- and it may have to await ruling on specifically how you word your questions -- I'm going to have to rule on as it arises. But the issue of the voluntariness of the statements was fully litigated before Magistrate Judge Boylan, subject of his order, subject of appeal and my ruling, and I think the law of the case is that these two statements, March 7th and March 8th, were voluntarily made. So I'm not going to let you relitigate voluntariness, but I am going to let you proceed to explore with the agent and whatever other evidence you may have the context or circumstances surrounding the taking of the statements.

MS. SYMCHYCH: Will I be allowed to explore the context of all of the factors that were present to get Joe Biernat, in his mind, to -- I'm not understanding the boundary of this.

THE COURT: Okay. Would some temporal boundaries be more important to talk about? Are you asking how far back can you go before the circumstances of the interviews?

MS. SYMCHYCH: No, it's -- I guess it's -- the circumstances in my mind as I plan to cross-examine include all of the pressures that were created and how they played into or didn't play into what Joe Biernat said and what Agent Boylan did in response to that so the jury has a full chance to evaluate and weigh whether it believes that these things (indicating) are Joe Biernat's statements.

THE COURT: Any question that I see and perceive as directed to seek information which will assist the jury in figuring out how to weigh or balance the testimony with regard to did he make these statements, are these his statements, that's appropriate, because that's part of the context, circumstances, milieu, if you will, surrounding the statements, but I'm not going to let you relitigate voluntariness. You can talk about what was present at the interview. We talked about some of the materials that may have been there, the setting of the scene. I think all of those things fall within the language of 3501(a) and are appropriate in letting the jury weigh and analyze the statements.

MS. SYMCHYCH: We'll have to work through it, but for the record and for record purposes, it is our position that there is not an articulable distinction between the proper jury issues in evaluating the confession, the alleged confession, and the constitutional standards that have been previously argued. I understand that the constitutional decision has been decided, but I think if the Court is intending to limit the factual exploration, that it is depriving the defendant of the opportunity to litigate what he's entitled to with respect to the jury's acceptance or disregard of the statements.

THE COURT: Okay. The record is preserved. We may meet this issue again in deciding how the jury is going to be properly instructed in this, but it is my current intent to give the Eighth Circuit model instruction that tells them that the weight is what they're to consider and not the circumstances.

All right. We'll summon the jury and proceed with the cross-examination.

(Jury enters)

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

Plaintiff,

v.

THOMAS JAMES MARTIN
JOSEPH PAUL BIERNAT, and
JOSEPH WILLIAM MARTIN,

Defendants.

File No. CR-02-127 (ADM/AJB)

DEFENDANT BIERNAT'S MOTION IN LIMINE FOR ADMISSION OF 404(B) EVIDENCE AGAINST GOVERNMENT WITNESS , SPECIAL AGENT SEAN BOYLAN, AND RENEWED MOTION FOR DISCOVERY EVIDENCE RELATING TO MISCONDUCT AND DISCIPLINE OF S.A. BOYLAN

INTRODUCTION

Defendant Joseph Paul Biernat asks for an in limine ruling regarding the use of other-acts evidence, Fed. R. Evid. 404(b), during cross-examination against the Government's witness, Special Agent Sean Boylan. Specifically, Mr. Biernat seeks to cross-examine Agent Boylan about his use of coercive and deceptive interrogation tactics in other cases, tactics that are nearly identical to those used with Defendant Biernat on March 7 and 8, 2002. As a preliminary matter, if this Court agrees the statements made to the FBI on March 7

and 8 must be suppressed (Objections to the Report and Rec. dated Sept. 16, 2002, at 1-7), there will be no need to cross-examine S.A. Boylan with this evidence and this motion will be moot. However, if the statements are admitted during trial for any reason, Mr. Biernat seeks admission of this 404(b) evidence against Agent Boylan on the question of voluntariness; such evidence is relevant to Agent Boylan's plan, preparation, intent, absence of mistake, and motive with respect to deceptive interrogation tactics, psychological coercion, and other unorthodox behavior.

ARGUMENT

A. Other-Acts Evidence Should be Admissible Against S.A. Boylan

Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts is admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Such evidence may be admitted when: (1) it is relevant to a material issue at trial; (2) the prior bad acts are similar in kind and reasonably close in time the present acts complained of; (3) a jury could reasonably find that the prior bad acts occurred and that the same person was the actor; and, (4) the potential prejudice of the evidence does not outweigh its probative value. E.g., Huddleston v. United States, 485 U.S. 681, 689 (1988); Westcott v. Crinklaw, 68 F.3d 1073, 1078 (8th Cir. 1995); United States v. Burk, 912 F.2d 225, 228 (8th Cir. 1990); see also United States v. Cohen, 888 F.2d 770, 776-77 (11th Cir. 1989).

Other-acts evidence is not limited to use against a criminal defendant, but may be used against any witness, including a government witness. Cohen, 888 F.2d at 776-77; United States v. Aboumoussallem, 726 F.2d 906, 911-12 (2d Cir. 1984). In fact, when other-acts evidence is offered by a

criminal defendant, the normal risk of prejudice is absent, and the standard of admissibility in such cases "need not be as restrictive as when a prosecutor uses such evidence." Aboumoussallem, 726 F.2d at 911; see Cohen, 888 F.2d at 777; United States v. McClure, 546 F.2d 670, 672-73 (5th Cir. 1977) (recognizing a defendant's right to introduce 404(b) evidence as part of his "right to present a vigorous defense"). There are also examples of cases, most of which arise in the civil context, in which evidence of a police officers' bad acts from other cases has been ruled admissible under 404(b). E.g., Westcott, 68 F.3d at 1078; Wilson v. City of Chicago, 6 F.3d 1233, 1238 (7th Cir. 1993) (holding that district court erred in excluding acts evidence against the police officers in a section 1983 claim, and holding that the evidence should have been admitted to show intent, opportunity, preparation, and plan, and also as impeachment evidence.). In addition, a defendant who challenges police conduct with respect to an interrogation is entitled, under appropriate circumstances, to production of information that goes beyond the scope of his own case and delves into the police officer's conduct in others as a means of showing the credibility of his motion to suppress. Both Rules 609(b) and 404(b) of the Federal Rules of Evidence allow the admission of such evidence, and a number of courts have long-recognized the right to production of police personnel files, as well as the right to call witnesses regarding interrogation tactics used by the same police officer in other cases. E.g., United States v Kiszewski, 877 F.2d 210, 215-16 (2d Cir. 1989); United States v. Acosta, 111 F. Supp.2d 1082, 1088-89 (E.D. Wis. 2000); People v. Puglisi, 376 N.E.2d 1325, 1326 (N.Y. 1978).

In this case, the other-acts evidence that Mr. Biernat seeks to introduce goes directly to plan, preparation, intent, absence of mistake, and motivation on the part of S.A. Boylan with respect to at least two material defense issues. One material defense issue is whether the statements made by

Mr. Biernat on March 7 and 8 to the FBI were voluntary or were coerced. In reviewing the voluntariness of a statement, relevant factors include the tactics used by the interrogating officers. E.g., Withrow v. Williams, 507 U.S. 680, 693 (1993); see Dickerson v. United States, 530 U.S. 428, 434 (2000). Here, as was made clear during the suppression hearing, the facts of the interrogations as presented by the Defense and the facts as presented by the Government (namely, the FBI agents who interrogated Mr. Biernat) are irreconcilable-the Government paints picture of the March 7 and 8 encounters as voluntary, casual, and friendly, whereas the Defense paints a picture of extreme coercion, deception, and pressure. (Cf., e.g., Tr. 8/5/02 at 101-04, with Tr. 8/1/02 at 75-83.) Therefore, another material issue to Mr. Biernat's defense is the credibility of S.A. Boylan. See Westcott, 68 F.3d at 1078 (noting, in the context of whether it was error for the district court to exclude 404(b) evidence, that credibility was a key issue at trial); United States v. Kiszewski, 877 F.2d 210, 215-16 (2d Cir. 1989). The evidence that Mr. Biernat seeks to introduce would be relevant to both of those material issues.

The following fact chart, which was introduced by way of offer of proof to the Magistrate Judge (Offer of Proof Regarding Czichray Case, Aug. 1, 2002), compares the facts in this case with the facts from another instance in which S.A. Boylan used unorthodox interrogation tactics. The other-acts evidence summarized below is from United States v. Czichray, No. CRIM.01-307 (JRT/FLN), 2002 WL 54504 (D. Minn. Jan. 7, 2002).

Offer of Proof

Czichray	Biernat
approach by surprise early a.m.; agent initiated	approach by surprise in a.m.; agent initiated
compromising position, in boxer shorts	compromising position, with stool sample in hand
situational, psychological disadvantage, barely awake, waylaid from employment	situational, psychological disadvantage, ill, on medication
take a few minutes to show you	have info to share with you, only take a few minutes
we'll go our way, and you yours	we'll go our way, and you yours
2-hour monologue by Boylan	extended monologue by Boylan
investigative power of the FBI	technology and case file props techniques of the FBI
no Miranda warning	no Miranda warning
7-hour interrogation	approximately 8-hour interrogation on two days
in own home	in HCMC cafeteria/in own home

pressure to cooperate through unorthodox methods	pressure to cooperate through unorthodox methods
dictated who sat where, use of restroom and phone	dictated place of interview, who sat where
heavy-handed behavior and psychological strong-arm tactics	heavy-handed behavior and psychological strong-arm tactics
verbal threats of FBI power	verbal threats of FBI power
verbal threats to involve elderly father	verbal threats to wife in his presence; verbal threats to involve aged, ill mother, child, child's teacher, and neighbors
	assurances regarding use of writings
ruse to get in	ruse to sit down together ruse to get 1st writing ruse to deflect legal representation ruse to get 2nd writing
multiple statements by FBI of voluntariness, free to leave	multiple statements by FBI of voluntariness, free to leave

In addition to the Czichray parallels, the transcripts and the Reports and Recommendations regarding suppression from the Sabri and Erhart cases show the same introductory approach by Agent Boylan to induce suspects to meet with him, the same veiled language about whether formal arrest is

or is not contemplated, and the use of ruse and psychological deception on a virtually case-by-case basis.[1] It does not matter in these other cases whether the statements taken from the suspects were ultimately suppressed; what matters is that some degree of deception and coercion by S.A. Boylan, similar to the deception and coercion used with Mr. Biernat, was found to have occurred.

As the fact chart above demonstrates, the other-acts evidence Mr. Biernat seeks to introduce is so strikingly similar to behavior he complains of with respect to Agent Boylan that it falls within 404(b).[2] Even if the facts were not nearly so alike, courts in this Circuit do not require that the other-acts evidence be an exact replica. See United States v. Shoffner, 71 F.3d 1429, 1432 (8th Cir. 1995) ("When admitted for the purpose of showing intent, the prior acts

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[1] For a more complete description of relevant facts in Mr. Biernat's case, see Objections to the Report and Recommendation dated September 16, 2002, filed on September 27, 2002, at pages 2-3. For a more complete description of the relevant facts from the Czichray case, see United States v. Czichray, No. CRIM.01-307 (JRT/FLN), 2002 WL 54504 (D. Minn. Jan. 7, 2002), and United States v. Czichray, No. CRIM.01-307 (JRT/FLN), Report and Recommendation, Dec. 20, 2001. For the Court's convenience, the Czichray documents, along with the Sabri and Erhart documents, have been attached to the accompanying affidavit of Kimberly Fuhman.

[2] Mr. Biernat also contends that the specific evidence he seeks to use against Agent Boylan on cross-examination will also be admissible, depending on the testimony that Agent Boylan gives, to impeach his testimony. Wilson v. City of Chicago, 6 F.3d at 1238; United States v. Acosta, 111 F. Supp. 2d 1082, 1090 (E.D. Wis. 2000).

need not be duplicates. . . ." (internal quotation marks and citation omitted).) Likewise, the other-acts evidence is certainly close in time to the events of March 7 and 8. Indeed, the Czichray opinion by Judge Tunheim was released in January 2002 — only two months before the very same agents interrogated Mr. Biernat. Czichray, 2002 WL 54504, at *1.

The Court should also admit the other-acts evidence because it is reasonably likely that a jury could find that the acts occurred, and that S.A. Boylan was the actor. Huddleston, 485 U.S. at 689. Here, there can be no question that a jury could reasonably find that the Czichray facts summarized above, which are derived from judicial findings and from testimony of S.A. Boylan and S.A. Bisswurm in the Czichray case, occurred. Mr. Biernat anticipates that the Government will challenge this premise, as it did in a submission to this Court, (Gov't's Mem. in Opp'n to Def. Biernat's Appeal from Magistrate Judge's Orders of May 31 and June 5, 2002, dated June 16, 2002, at 9-10), and that the Government will not concede the finality of the legal conclusion to suppress by Judge Tunheim or the findings made by Magistrate Judge Noel due to a procedural error in Czichray. This complaint, if made, is a smoke-screen-given the liberal standard for admission of such evidence, it is simply a non-issue. Huddleston, 485 U.S. at 689. This is confirmed by looking at Supreme Court precedent in which that Court has ruled admissible, under 404(b), other-acts evidence involving acts for which the person was acquitted. Dowling v. United States, 493 U.S. 342, 348-49 (1990). Surely if the Supreme Court held that a jury could reasonably find that acts occurred for which a person had been acquitted, so too could a jury reasonably conclude that the facts as set forth in Magistrate Judge Noel's Report and Recommendation and in Judge Tunheim's opinion occurred.

The prejudice of introducing this evidence is certainly not outweighed by its unique probative value. In any event, there are not the same prejudice concerns when 404(b) evidence is admitted by, instead of against, a criminal defendant. Cohen, 888 F.2d at 777; Aboumoussallem, 726 F.2d at 911. Moreover, to exclude this evidence would surely interfere with Defendant Biernat's constitutional right to present a vigorous and full defense. See, e.g., United States v. McClure. 546 F.2d at 672-73. The only direct evidence of Mr. Biernat's alleged wrong-doing in this case is the statements made on March 7 and 8. The case centers on the fight between the Government and Mr. Biernat about whether those statements were taken in violation of his constitutional rights. To deny Mr. Biernat the right to thoroughly and zealously challenge the Government on this issue would be clear error.

When compared to the Government's Motion to Admit Evidence Regarding Prior Bad Acts (1993 Construction Work), filed on September 23, 2002, the strength of Mr. Biernat's arguments for admission of the other-acts evidence against S.A. Boylan becomes clear. For instance, the bad acts as alleged by the Government are not at all similar to the crimes it alleges in the Indictment, the Government does not even allege that any official act was performed in return for the supposed free plumbing. This key issue, the "quid pro quo," is what renders such an act illegal under the Hobbs Act. Without it, there is nothing similar about the two instances. The other-acts evidence Mr. Biernat seeks to introduce, on the other hand, involves the very same type of bad conduct, that is, deceptive and coercive interrogation tactics. As far as the time element, the acts alleged by the Government are not close in time, rather, the two alleged acts are separated by six years. By contrast, the judicial rulings regarding Agent Boylan were rendered close in time to the Biernat interrogatories. The other acts alleged by the Government have no supportive proof from anyone of

any quid pro quo, or of any relation to any official city business, whereas the other acts complained of by Mr. Biernat are supported by judicial fact findings of coercive and deceptive tactics. On the whole, the evidence sought to be introduced by Mr. Biernat easily meets the test for admission, which is made even more evident by looking at the comparatively weak showing made by the Government.

B. Renewed Motion for Discovery of Evidence Relating to Misconduct and Discipline of S.A. Boylan

On May 22, 2002, Defendant Biernat requested that the Magistrate Judge order the Government to produce, prior to the suppression hearing, materials relating to Agent Boylan. (Def. Biernat's Mot. No. 3 to Suppress Statements, Admissions, and Answers May 22, 2002; Ex. 1, attached to Mem. of Points and Authorities in Support of Def. Biernat's Mot. to Suppress, May 22, 2002.) This motion was effectively denied, although the Magistrate Judge conducted an in camera review of the materials sought and provided some limited discovery. (Mem. Op. and Order July 1, 2002, at 1-2.) This Court reviewed Defendant Biernat's appeal of the Magistrate Judge's related orders dated May 30, 2002, and June 5, 2002, and concluded that "[a]t this early stage, there has been no evidentiary record developed or argument on the anticipated motions to suppress evidence. (Id. at 2.) The Court further noted that "[g]iven the procedural posture presented here, that is, with no evidence of the circumstances under which Biernat's statements were made, a comparison of the facts of Czichray is impossible." (Id. at 3.) Today, Defendant Biernat renews his motion for discovery and requests relevant Brady materials again.

The requested materials include all documents relating to internal reviews of investigative conduct of S.A. Boylan, all FBI documents relating to S.A. Boylan's conduct

in the Czichray case, and all complaints to the FBI about the investigative conduct of S.A. Boylan, copies of all questions prepared in anticipation of the Biernat interrogatories, copies of all interview instructions, copies of all FBI logs regarding the Biernat interrogatories, all FBI radio logs showing contact with Defendant Biernat, and all FBI sign-out sheets regarding evidence removed from the FBI in preparation to interview Mr. Biernat. (Fuhrman Aff. Ex. I and J.) Mr. Biernat also requests the Court order the Government to produce the physical evidence actually removed from the FBI and taken to interview Mr. Biernat. In addition to the above items, Defendant Biernat asks this Court to compel the Government to produce the most current version of the FBI Legal Handbook. Magistrate Judge Boylan, after an in camera review of items sought by the Defense from the Government, ordered the Government to produce a portion of that document. (Order on In Camera Materials, June 5, 2002.) After that portion was produced, the Defense learned that the entire FBI Legal Handbook was publicly available on the Internet. After obtaining a copy of this publicly-available document, the Defense then requested (and the Government did not object) that it be permitted to use the entire document at the suppression hearing to cross-examine S.A. Boylan. The Magistrate permitted extensive cross-examination with the document, but S.A. Boylan would not concede that the publicly-available document shown to him by the Defense was in fact the most current FBI Legal Handbook. (Tr. 7/25/02 p.m. at 196-97.) To avoid a contest at trial relating to, for instance, the FBI's most current directive to its Agents about whether they may interview a represented party or a target, Mr. Biernat seeks an order to require production forthwith of the most recent version of the FBI Legal Handbook before trial.

Today, the kind of evidence noted by the Court in its Memorandum Opinion and Order of July 1, 2002 is fully developed and of record. For that reason, and because the

type of evidence requested is admissible as 404(b), other-acts evidence, and as impeachment evidence (as is demonstrated above) Mr. Biernat renews his discovery motion for these specific items, because they constitute highly relevant evidence for trial. Moreover, the evidence constitutes Brady material, as set forth in Exhibit 1 to the May 22, 2002, Memorandum of Points and Authorities in Support of the Motion to Suppress. See, e.g., United States v Kiszewski, 877 F.2d 210, 215-16 (2d Cir. 1989); United States v. Acosta, 111 F.Supp.2d at 1088-89; People v. Puglisi, 376 N.E.2d 1325, 1326 (N.Y. 1978); Dell v. Superior Court, 144 Cal. Rptr. 418, 421 (Cal. Ct. App. 1977); People v. Sumpter, 347 N.Y.S.2d 670, 677-78 (Sup. Ct. N.Y. 1973); State v. Fleischman, 495 P.2d 277, 282 (Or. App. 1972).

CONCLUSION

If for any reason the Court admits the parts of the statements he made interrogations of on March 7 or 8, Mr. Biernat must be permitted to cross-examine the Government's key witness and the taker of those statements, S.A. Boylan, with 404(b) evidence relating to S.A. Boylan's unorthodox and coercive interrogation conduct in other similar case. In addition, Mr. Biernat is entitled to the discovery and Brady materials about misconduct, discipline, and interrogation tactics, of S.A. Boylan.

Dated: September 30, 2002

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